

DEFAMATION BY ASSOCIATION: WHAT 'SEXY COPS' CAN TEACH US

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Las Vegas “sexy cops” have a lot to teach us about balancing the right to expressive association against liability for speech. In *Santopietro v. Howell*,¹ which alleged violations of 42 U.S.C. § 1983 against four officers of the Las Vegas Metropolitan Police Department, the Ninth Circuit held that the officers lacked

probable cause to arrest a “sexy cop” performance artist, Santopietro, because of the speech of her fellow “sexy cop” performer, Patrick. Santopietro and Patrick presented what the Ninth Circuit described (without elaboration) as a “sexy cop routine.” Law applicable to the Vegas Strip permits performance artists to perform for tips so long as they do not demand compensation. An issue in *Santopietro* was whether Patrick’s purported compensation “demand” to an undercover officer, after the officer photographed the “sexy cop routine,”² could be attributed to Santopietro in order to satisfy the elements of unlawful street performance.³

The Ninth Circuit held that the First Amendment’s protection of expressive association precluded the officers’ theory that combining the speech acts of two associated performers could supply probable cause for Santopietro’s arrest:

“[F]ull First Amendment protections accorded Santopietro’s own activities do not lapse because of what Patrick said or did without Santopietro’s direct participation. Rather, Santopietro and Patrick’s expressive association may not be the sole basis relied upon to attribute Patrick’s actions to Santopietro.”

Slip op. at 15.

The Ninth Circuit’s holding stemmed largely from *NAACP v. Claiborne Hardware Co.*, wherein the Supreme Court reiterated that the First Amendment “restricts the ability of the State to impose liability on an individual solely because of his association with another.”⁴ Unlike the criminal law underpinnings of *Santopietro*, *Claiborne* was a suit for civil damages under Mississippi common law against the NAACP and individual members who participated in a boycott.

The Mississippi Supreme Court affirmed the trial court’s finding of liability based on “[i]ntimidation, threats, social ostracism, vilification, and traduction” purportedly undertaken by certain NAACP members.⁵ The U.S. Supreme Court reversed liability of both the NAACP as a whole and of certain individuals who had been held liable for the purported acts of others during the boycott. With respect to one individual, Charles Evers, the Court held that he could not be held liable for his speech, or purported failure to repudiate violent acts, absent evidence that he “authorized, ratified, or directly threatened acts of violence.”⁶

The Problem of Liability by Association

Santopietro, and the cases underlying it, touches upon crucial issues of associational freedoms in this time of political tumult. Although *Santopietro* involved criminal prosecution, civil liability for the effects of associational speech is just as powerful a deterrent of speech – as *Claiborne Hardware* itself demonstrates. The plaintiffs in *Claiborne Hardware* were 17 “white merchants” who sued the president of the Mississippi NAACP, its field secretary, and 142 boycott participants for injunctive relief, a prejudgment writ of attachment, and damages.⁷

1. 857 F.3d 980 (9th Cir. 2017).

2. Such meta-sexy-cop photography itself seems like performance art, but we digress.’

3. For more information about Ms. Santopietro, whose credits include *Sex and the City*, *Days of Our Lives*, and *The Sopranos*, see http://www.imdb.com/name/nm0763873/?ref_=nv_sr_1 (accessed July 3, 2017) (yes, it is safe for work).

4. 458 U.S. 886, 918-19 (1982)

5. *Claiborne Hardware*, 458 U.S. at 894.

6. *Id.* at 924.

7. *Id.* at 889, 890.

DEFAMATION BY ASSOCIATION: WHAT 'SEXY COPS' CAN TEACH US

Continued from page 5

A special problem arises in the context of defamation, or business torts reliant upon defamation or speech, where the offending speech act occurs as part of a group effort. For example, a corporate plaintiff that believes it has been defamed in the course of a public awareness campaign might wish to sue individuals affiliated with a protest group rather than the group itself – whether for reasons of optics, deterrence, or deeper pockets.

As *Santopietro* makes clear, such a plaintiff cannot simply rely on a defendant's associational ties to state a plausible claim for relief. Rather, a plaintiff will need to allege facts supporting each element of each claim against each individual defendant.⁸ This includes publication of the purported defamatory statement — an element that can be difficult to support factually, at the outset of litigation, where a public campaign is involved. Just as Vegas Metro could not permissibly attribute Patrick's payment demand to Santopietro, a plaintiff may not satisfy the "publication" element without pointing to facts indicating plausibly that a particular defendant intentionally disseminated the offending material.⁹

Conspiracy to defame appears to remain a way to avoid a *Santopietro*-type defense. So long as a plaintiff can plead and prove the elements of conspiracy, that plaintiff could prevail on a theory that the group as a whole has defamed the plaintiff. The plaintiff need neither allege nor demonstrate that each member of the conspiracy satisfied each element of the tort.

JUDICIAL SPOTLIGHT: THE HONORABLE JUDGE JOLIE A. RUSSO



What is your background? (Where did you grow up, attend school, etc.)?

I grew up mostly in Oregon with some brief time away in Hawaii (managing a dive shop). I also worked for several years at the Portland VA Hospital on the inpatient psychiatric ward. I attended Lewis and Clark Law School and besides being a Magistrate Judge I also work as an Adjunct Professor at the University of Oregon Law School.

When did you realize you were attracted to the legal field and what prompted that realization?

Growing up without much money and seeing the difference in how people with money were treated and realizing the opportunities that come with wealth. I was very focused on trying to level the playing field. That interest eventually led me to the study of law.

In your opinion, what do you think differentiates a good lawyer from a great lawyer?

An ability to pull the lens back and understand both the legal and practical circumstances of a situation.

8. Oregon's anti-SLAPP statute, ORS 31.150-31.152, which applies in federal court, makes this clear.

9. This can be particularly difficult when automated email dissemination to a list of recipients is involved.